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YEE CHEONG SENG

v.

PP

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COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
CLEMENT SKINNER JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: J-05-78-09]

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14 JUNE 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 12(2) & 39B(1)(a) - Conviction on two charges of possessing 6.58 grams and of trafficking in 191.65 grams methamphetamine - Two years' imprisonment*

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and three strokes of rattan on first charge and death sentence on second charge - Appellant appealing against conviction and sentence - Whether trial judge erred in relying on hearsay evidence of police officer relating to information received about drug trafficking activities - Whether appellant sufficiently identified as accused in crime scene - Whether appellant had

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actual possession and knowledge of drugs - Whether trial judge erred in rejecting presence of another party as mere fabrication

The appellant was found guilty on two charges preferred against him under the Dangerous Drugs Act 1952 ('the Act'). He was sentenced to two years' imprisonment and three strokes of the

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rattan on the first charge of possessing 6.58 grams of methamphetamine contrary to s. 12(2) of the Act. As for the second charge, he was sentenced to death for trafficking in 191.65 grams of methamphetamine contrary to s. 39B(1)(a) of the

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Act. The facts showed that the appellant was detained by the police following information received by a police inspector ('PW3') on drug trafficking activities carried out by a Chinese man near a hotel called the Sunday Hotel. PW2 and PW3, both police officers, testified that they had seen the appellant enter and leave

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the hotel before he was detained. The impugned drugs were discovered in the appellant's car and in the hotel room that was opened with a key that the appellant had with him.

In this appeal against his conviction and sentence, the appellant argued, *inter alia*, that (1) the trial judge erred in relying on the

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hearsay evidence of PW3 relating to information received about

the drug trafficking activities; (2) there was no evidence identifying the appellant as the same Chinese man seen arriving and leaving the hotel; (3) the appellant had no actual possession and knowledge of the impugned drugs; and (4) the trial judge erred in rejecting the presence of his friend Ah Chiang with him as a mere fabrication.

Held (dismissing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) Although the trial judge did make reference to the particular piece of hearsay evidence of PW3, his judgment was based on the testimony of the police officers who had carried out the surveillance on the crime scene which evidence was direct and not hearsay. Therefore, the appellant was not prejudiced by reason of the reference to the hearsay evidence of PW3. (para 17)

(2) Based on the evidence adduced, the appellant was sufficiently identified as the same Chinese man seen arriving and leaving the hotel and entering the car in which the drugs were recovered from. There was no reason to believe that the police officers deliberately lied about what they observed at the scene of the incident. (para 18)

(3) On the evidence adduced, the trial judge was correct in finding that the appellant was in actual possession of the drugs recovered from the car and from the hotel room. The trial judge was also right in inferring that the appellant had knowledge of the drugs so recovered. (para 19)

(4) The trial judge clearly did not invoke a double presumption as contended by the appellant. The trial judge correctly rejected the presence of the appellant's friend Ah Chiang as a mere fabrication. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu didapati bersalah atas dua pertuduhan di bawah Akta Dadah Berbahaya 1952 ('Akta tersebut'). Dia dihukum dua tahun pemenjaraan dan tiga pukulan rotan atas pertuduhan pertama memiliki 6.58 gram methamphetamine di bawah s. 12(2) Akta tersebut. Berkaitan pertuduhan kedua pula, perayu dihukum mati

bagi pengedaran dadah 191.65 gram methamphetamine di bawah s. 39B(1)(a) Akta tersebut. Fakta kes menunjukkan bahawa perayu ditahankan polis berikutan maklumat yang diterima oleh seorang Inspektor polis ('PW3') mengenai aktiviti pengedaran dadah yang dijalankan oleh seorang bangsa Cina berdekatan sebuah hotel yang bernama Sunday Hotel. PW2 dan PW3, kedua-dua pegawai polis, mendakwa bahawa mereka telah melihat perayu masuk dan keluar hotel tersebut sebelum dia ditahankan. Dadah tersebut telah dijumpai di dalam kereta perayu dan di dalam bilik hotel yang telah dibuka dengan kunci yang dipegang perayu.

Dalam rayuan terhadap sabitan dan hukuman ini, perayu berhujah, *inter alia*, bahawa (1) hakim bicara terkhilaf dengan bergantung atas keterangan dengar cakap PW3 berkaitan maklumat yang diterima mengenai aktiviti pengedaran dadah tersebut; (2) tiada keterangan mengecam perayu sebagai orang Cina tersebut yang telah dilihat sampai dan tinggalkan hotel berkenaan; (3) perayu tidak mempunyai pemilikan sebenar dan pengetahuan mengenai dadah tersebut; dan (4) hakim bicara terkhilaf dalam menolak kehadiran kawannya seorang Ah Chiang sebagai hanya satu rekaan palsu.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Walaupun hakim bicara telah membuat rujukan kepada keterangan tertentu dengar cakap PW3, penghakimannya berdasarkan testimoni pegawai-pegawai polis yang telah menjalankan pengawasan jenayah tersebut di mana keterangannya adalah terus dan tidak merupakan keterangan dengar cakap. Maka, perayu tidak diprejudiskan dengan rujukan kepada keterangan dengar cakap PW3 tersebut.

(2) Berdasarkan keterangan yang diterima masuk, perayu telah secukupnya dicamkan sebagai orang Cina berkenaan yang telah sampai dan tinggalkan hotel tersebut sebelum memasuki kereta di mana dadah tersebut telah dijumpai. Tiada alasan bagi mempercayai bahawa pegawai-pegawai polis dengan sengajanya telah berbohong berkenaan apa yang telah mereka meneliti di kejadian tersebut.

(3) Berdasarkan keterangan yang diterima masuk, hakim bicara adalah betul dalam mendapati perayu mempunyai pemilikan sebenar dadah yang disyaki yang diperolehi dari kereta dan dari bilik hotel tersebut. Hakim bicara juga adalah betul dalam membuat penyimpulan bahawa perayu mempunyai pengetahuan mengenai dadah yang telah diperolehi.

(4) Hakim bicara tidak membangkitkan anggapan berganda seperti mana yang didakwa perayu. Hakim bicara dengan betulnya telah menolak kehadiran kawan perayu Ah Chiang tersebut sebagai satu rekaan palsu.

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(da), 39B(1)(a)

For the appellant - Gooi Soon Seng; M/s Gooi & Azura
For the respondent - Shoba Venu Gobal; DPP

[Appeal from High Court, Kuala Lumpur; Criminal Appeal No: 42-42-2005]

Reported by Usha Thiagarajah

JUDGMENT

Zaleha Zahari JCA:

[1] Two charges were preferred against the appellant in this case. Firstly, for possession of 6.58 grams of methamphetamine contrary to s. 12(2) of Dangerous Drugs Act 1952 (the Act); secondly, trafficking of 191.65 grams methamphetamine contrary to s. 39B(1)(a) of the Act. The High Court found the appellant guilty of both charges on 24 April 2009. In respect of the 1st charge, the appellant was sentenced to two years imprisonment and three strokes, whilst in respect of the 2nd charge, the mandatory sentence of death was imposed upon him.

[2] We dismissed the appellant's appeal against the decision of the High Court against conviction and sentence in respect of both charges preferred against him for the following reasons.

[3] The evidence adduced by the prosecution was this. On 9 March 2005 at about 12 midnight Insp Norhisham bin Mustaphar (PW3) received information about drug trafficking

A activities by a Chinese man at Jalan Bakawali 48, Taman Johor Jaya, Johor Bahru near Sunday Hotel using a Proton Waja registration No. WJA 9290 (the said car). At about 12.30am, PW3, together with ASP Abdullah bin Mohamad (PW2), arrived at Sunday Hotel to carry out surveillance.

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[4] Both PW2 and PW3 testified that at about 1am, a Proton Waja No. WJA 9290 (the said car) drove up and parked the said car in front of Sunday Hotel. That a Chinese man in a dark shirt alighted from the said car, then went into Sunday Hotel carrying
C a brown sling bag with him.

[5] PW3 and his team continued their surveillance until 7am. At about 7am a Chinese man came out of the Sunday Hotel, entered the said car parked in front of Sunday Hotel. However, before the Chinese man could drive off, he was detained by the police.

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[6] PW3 identified himself as a police officer, and asked the Chinese man (identified as accused ie, the appellant) to open the door of the said car. PW3 carried out a body search on the appellant but did not find anything incriminating on him. The
E appellant appeared frightened. PW3 then carried out a search of the said car and found a package wrapped in newspaper (exh. P6A) under the steering dashboard of the said car. Upon opening the package in the presence of the appellant PW3 found that it contained five clear plastic packets (exh. P6A1-5) containing
F crystalline substance suspected to be syabu. PW3 then seized the exhibits and arrested the appellant.

[7] PW3 also recovered a key for room no. 201 of Sunday Hotel from the appellant. The appellant was then brought to
G room no. 201 of Sunday Hotel. The key retrieved from the appellant was then used to open room 201. There was no one in room no. 201. The police carried out a search of the room in the presence of the appellant and three police officers. In room no. 201, PW3 saw a brown sling bag (exh. P8B) on the bed. Upon
H opening the brown sling bag, PW3 recovered a package wrapped in transparent plastic containing three transparent plastic packages (exhs. P9A1-3) which in turn contained crystalline powdery substances suspected to be syabu. The police found a receipt issued by Sunday Hotel in the name of the appellant from the
I sling bag (exh. 9B). PW3 seized all of the said exhibits and brought the said exhibits and the appellant to his office, Jabatan Siasatan Jenayah Narkotik Johor Bahru.

[8] Muhammad Yazid bin Ibrahim (PW4), the chemist, testified that the result of the tests carried out by him confirmed that the crystalline substances in exh. P9 to be Methaphetamine having a net weight of 6.58 grams, whilst in respect of exh. P6, to be methamphetamine having a net weight of 191.65 grams (exh. P17) the subject matter of the charges preferred against the appellant. A B

[9] At the end of prosecution's case the Judicial Commissioner held that the prosecution had proved a *prima facie* case against the appellant and called upon him to enter his defence. We are of the view that based on the evidence adduced by the prosecution the learned trial judge was right in finding the prosecution had proved a *prima facie* case against the appellant and calling upon him to enter his defence. C

[10] The appellant's defence was as follows: On 10 March 2005 at about 1am he arrived at Sunday Hotel with a friend Ah Chiang/Ah Keong in the said car. Ah Chiang was driving the said car, having picked him up earlier at Larkin bus station upon his arrival by bus from Kuala Lumpur to Johore Bahru. The purpose of coming to Johore Bahru was to look for prostitutes. At Ah Chiang's request they checked into the hotel under the appellant's name and occupied room no. 201. D E

[11] They did not find any prostitute that night. Both of them then went out for a meal. Upon returning to their hotel room, the appellant went to bed. On 10 March 2005 at 7am he woke up. Ah Chiang was not in the room. He tried to contact him through his hand phone but was unsuccessful. He saw the car keys on a table and decided to take the said car to go for breakfast. He opened the door of the said car and was seated in the driver's seat when the said car was blocked by a car. Two Malay men alighted from the car which blocked his car, pointed a pistol in his direction and identified themselves as police. F G

[12] The police ordered him to open the car door. He opened the car door and came out of the car. He was beaten up, handcuffed and ordered to squat beside the said car. The police then examined the said car. A package was recovered from the said car and the police questioned him about it. The appellant said he had no knowledge of the package which was recovered, that he had not seen it before and that the car belonged to Ah H I

Chiang. He was then taken to the hotel room no. 201 Sunday Hotel which he was occupying. He was then shown a number of packages. He denied having any knowledge of the packages shown to him. He did not know from where the packages were recovered. The appellant had no knowledge of the contents of the packages recovered in room no. 201 as well as in the said car.

Findings Of The High Court At The Conclusion Of The Case

[13] The learned Judicial Commissioner accepted the evidence of PW2, PW3 and PW5. The evidence of PW2 and PW3 was that the appellant had arrived alone in the said car and entered Sunday Hotel. The hotel receipt for the deposit paid was issued in the name of the appellant. That at about 7am the following day, the appellant came out of Sunday Hotel alone, approached the said car, entered it and was alone when the police apprehended him.

[14] The Judicial Commissioner rejected the defence story of the room being registered under the appellant's name at Ah Chiang's request as unlikely as the receipt was issued in the appellant's name, and nothing in room 201 indicating the presence of any other occupant apart from the appellant. The Judicial Commissioner then ruled that the appellant's story about "Ah Chiang" is a mere fabrication unsupported by evidence. That it was but a desperate attempt on the appellant to shift the blame on a non-existent person.

[15] The Judicial Commissioner then made a finding of fact that at the material time and place, the appellant had knowledge of the incriminating drugs recovered from the said car as well as the incriminating drugs recovered from the sling bag which he carried to the hotel room. Based on the evidence before him the Judicial Commissioner held that the appellant had not raised any reasonable doubt in his favour. Further, the appellant had also failed to rebut the presumption of trafficking, under s. 37(da) of the Act on a balance of probabilities. The Judicial Commissioner accordingly held that the prosecution had proved its case against the appellant beyond reasonable doubt to the charges preferred against him. He then found the appellant guilty, convicted him and sentenced him as stated in the earlier part of this judgment.

Decision

[16] The issues raised in argument before us on appeal was threefold. We will deal with these issues in turn.

[17] The appellant's counsel submitted that the Judicial Commissioner erred by relying on hearsay evidence. He submitted that SP3's evidence relating to information received about drug trafficking activities by a Chinese man near Sunday Hotel using the said car was hearsay evidence. On this issue, upon perusing the grounds of decision we note that although the Judicial Commissioner did make reference to this particular piece of evidence, his judgment however was based on the testimony of the police officers who had carried out the surveillance, which evidence was accordingly "direct" and not "hearsay" evidence. We are of the considered opinion that the appellant had not been prejudiced by reason of the reference to the information received which activated the police officers into action and to carry out the surveillance which they did, upon whose oral testimony the decision of the trial judge was clearly premised.

[18] It was then argued on behalf of the appellant that there was no evidence identifying the appellant as the Chinese man seen arriving at Sunday Hotel and that he was the same man seen leaving the said hotel the following morning and entering the said car. Upon appraisal of the evidence we are of the view that this argument is without basis and accordingly reject it. Reading PW2, PW3 and PW5's evidence as a whole, we are satisfied that the appellant who has been sufficiently identified as the Chinese man arriving in the said car at the Sunday Hotel is the same person leaving the Hotel the following morning, then entering the said car in which the drugs were recovered. There is no reason to disbelieve PW2, PW3 and PW5, for them to deliberately lie about what they observed at the scene of incident.

[19] Based on the evidence on record we are in agreement with the learned Judicial Commissioner's finding that the appellant was in actual possession of the drugs recovered from the fuse box compartment of the said car as well as that recovered in the room no. 210 Sunday Hotel. In our considered view the Judicial Commissioner was right in arriving at the findings of fact which he

A did. The Judicial Commissioner was also right in inferring that the appellant had knowledge of the drugs recovered in the said car and that from the sling bag in the hotel room occupied by him.

[20] The learned Judicial Commissioner clearly had not invoked a
B double presumption as contended by the appellant's counsel. The learned judge's rejection of the story of the presence of a friend named Ah Chiang being together with the appellant that night to be a mere fabrication was, in these circumstances, correct.

[21] For the above reasons the appeal was dismissed and the
C decision of the Judicial Commissioner affirmed.

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